

MEMORANDUM OF LAW

DATE: June 26, 1991

TO: F. D. Schlesinger, Clean Water Program Director

FROM: City Attorney

SUBJECT: Contract Interpretation Regarding Clean Water Program
Administrative Costs, Fiesta Island
Replacement Project Costs, and State Ocean Plan
Project Expenses

You have asked us to review the existing Metropolitan Sewage Disposal Agreements with regard to the distribution of costs for the administration of the Clean Water Program, the Fiesta Island Replacement Project, and the State Ocean Plan Project. Our analysis of the contracts, with regard to these items, is as follows:

CLEAN WATER PROGRAM

The Metro System member agencies can be divided into Participating and Later Participating Agencies. The original nine Participating Agencies are the Cities of Chula Vista, Coronado, El Cajon, Imperial Beach, La Mesa, National City and the Lemon Grove, Rolando (since annexed by the City of La Mesa) and Spring Valley Sanitation Districts. Their agreements are identical on the subject of administration, maintenance and operation, and read as follows:

Section 7. Administration, Maintenance and Operation.

The City shall operate, maintain, manage and control The Metropolitan Sewerage System in an efficient and economical manner and maintain and preserve it in good repair and working order, all in accordance with recognized sound engineering practices. City agrees to convey, treat (including chlorination if required) and dispose of all sewage received into The Metropolitan Sewerage System under the terms of this contract in such manner as to comply with all applicable laws, rules and regulations.

The manner in which administration, maintenance and operation expenses are calculated is described in Section 11 of the agreements; each agency is to pay an amount equal to that proportion of the total administration, maintenance, and operation expenses which the actual amount of sewage received that year from the Participating Agency bears to the total quantity of sewage handled and treated that year in the Metropolitan Sewerage System.

The Later Participating Agencies -- consisting of the Cities of Poway,

Lakeside, Alpine and Del Mar, and the Otay Water District, Padre Dam Municipal Water District and Wintergardens Sewer Maintenance District -- have nearly identical language in their agreements in Sections 7 and 10, respectively.

All agreements of the Participating and Later Participating Agencies thus expressly provide for sharing of administration, maintenance and operations costs. Therefore, the Clean Water Program's administrative costs are within the purview of Sections 7 and 11 in the Participating Agency agreements and Sections 7 and 10 in the Later Participating Agency agreements.

Participating and Later Participating Agency agreements allocate all water reclamation efforts to the City (Sections 28 and 25, respectively). We understand, therefore, that any costs associated with water reclamation and expansion will be segregated and will not be charged to the Participating and Later Participating Agencies as present administrative costs. Rather, those costs will be the subject of subsequent agreements dealing with "additions and improvements," as specified in Sections 14 and 13, respectively.

FIESTA ISLAND

The Fiesta Island Replacement Project (FIRP) clearly falls within the purview of the repair, reconstruction and replacement sections found in both the Participating and Later Participating Agency agreements. Replacements are improvements to the system which increase the service life of the existing facilities without increasing system capacity.

Within the Participating Agency agreements, Section 12, dealing with repair, reconstruction and replacement, reads as follows:

Section 12. Repair, Reconstruction and Replacement.

The Metropolitan Sewerage System shall be maintained by the City in good repair and good working order in accordance with sound engineering practices. It shall be the duty of the City to make repairs on the Metropolitan Sewerage System and to make replacements (including reconstruction) required to keep said facilities in good operating condition. Except as provided in Section 13 hereof, all repairs, reconstruction and replacements shall be part of the maintenance costs. ¶Emphasis added.σ

Within the Later Participating Agency agreements, Section 11 deals with repair, reconstruction and replacement. It reads as follows:

Section 11. Repair, Reconstruction and Replacement.

The Metropolitan Sewerage System shall be maintained by San Diego in good repair and good working order in accordance with sound engineer- ing practices. It shall be the duty of San Diego to make repairs on The Metropolitan Sewerage System and to make replacements (including reconstruction) required to keep said

facilities in good operating condition. Except as provided in Section 12 hereof, all repairs, reconstruction and replacements shall be part of the maintenance costs. ¶Emphasis added.σ

Within the purview of Sections 12 (Participating Agencies) and 11 (Later Participating Agencies), FIRP expenses may be legally allocated as part of the administration, maintenance and operation costs calculated in Sections 11 and 10, respectively.

STATE OCEAN PLAN

The State Ocean Plan, imposing state mandated requirements on receiving waters, falls within the purview of Section 7, Administration, Maintenance and Operation, of both the Participating and Later Participating Agency agreements, with regard to the conveyance, treatment and disposal "of all sewage received into the Metropolitan Sewerage System under the terms of this contract in such manner as to comply with all applicable laws, rules and regulations." ¶Emphasis added.σ The current 12,000 foot outfall is being supplemented with an additional 12,500 feet of pipe to comply with requirements imposed by the California State Ocean Plan. Yet again, administration, maintenance and operation costs are calculated pursuant to Section 11 (Participating Agency agreements) and Section 10 (Later Participating Agency agreements), and are based on that proportion of the total administrative, maintenance and operations expenses which the actual amount of sewage received from the agency bears to the total quantity of sewage treated.

Administration, maintenance and operation costs calculated under Sections 11 and 10, respectively, are on-going annual costs and should be paid accordingly. That the City of San Diego has borne these expenses on behalf of the Participating and the Later Participating Agencies up to this point does not negate the Metro Agencies' financial obligations with regard to these projects. The City's independent financial advisors recommend that the City be promptly reimbursed for costs incurred by the City from fiscal year 1987 through fiscal year 1990 for these projects.

JOHN W. WITT, City Attorney

By

Marguerite S. Strand

Deputy City Attorney

MSS:mb:453(x043.2)

ML-91-45